BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARILL SOUPENE	)	
Claimant	)	
VS.	)	
	)	Docket No. 211,737
RAYTHEON AIRCRAFT COMPANY	)	
Respondent,	)	
Self-Insured	)	

ORDER

Claimant appealed the March 15, 2000 Award entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument in Wichita, Kansas, on August 11, 2000.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for claimant. Jeff C. Spahn, Jr., of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. The record also includes the January 17, 2000 deposition of Dr. John F. McMaster. Additionally, the record includes the parties' stipulation, which was filed on February 4, 2000, wherein claimant's pre-injury average weekly wage was set at $951.17.

ISSUES

This is a review and modification proceeding filed in a claim for bilateral upper extremity injuries. By Stipulated Award dated September 30, 1997, the parties agreed that claimant was entitled to receive permanent partial general disability benefits for a 33.75 percent work disability until August 17, 1997, followed by benefits for a 16 percent whole body functional impairment. In that Stipulated Award, the parties also agreed that the appropriate date of accident for this repetitive trauma claim was April 26, 1996.

On November 18, 1999, claimant filed a request for review and modification of the Stipulated Award. The parties litigated the request for review and modification and in a March 15, 2000 Award, which is the subject of this appeal, Judge Clark concluded that

claimant was not entitled to a work disability as she refused to attempt to perform an assigned job.

Claimant contends Judge Clark erred. Claimant argues that she was justified in refusing to attempt to perform the assigned job because the job was operating the speed lathe, which was the same job that caused her bilateral carpal tunnel syndrome in the first instance. Claimant also argues that the speed lathe job was contrary to Dr. Lynn D. Ketchum's restrictions, which prohibited claimant from repetitive gripping and lifting over 20 pounds. Claimant contends she has a 70 percent wage loss and either a 73 percent or 97 percent task loss.

Conversely, respondent contends the March 15, 2000 Award should be affirmed. Respondent argues the assigned job was within claimant's permanent work restrictions, which respondent contends were no vibratory tools for more than three hours per day. Therefore, respondent argues that claimant was required to attempt to perform that job or forfeit her right to a work disability. Additionally, respondent argues that claimant elected to take early retirement because of personal health problems that were unrelated to her occupational injuries.

The issues before the Appeals Board on this review are (1) whether claimant has established her entitlement to a work disability despite her failure to attempt to perform an assigned job; (2) claimant's permanent partial general disability rating; (3) whether claimant's award should be reduced by her weekly disability retirement benefits; and (4) the amount of any additional benefits that she may be entitled to receive.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Claimant was employed by respondent as a bench machinist. In the mid-1990s, claimant developed bilateral carpal tunnel syndrome while working for respondent operating a speed lathe, a job that she performed for respondent for approximately eight to ten years.

2. In 1996, claimant had bilateral carpal tunnel release surgeries and was released to return to work that July with a medical restriction against using vibratory tools more than three hours per day. Despite that restriction, respondent accepted claimant back to work.

3. At her attorney's request, claimant saw hand specialist Dr. Lynn D. Ketchum in January 1997. The doctor diagnosed bilateral persistent carpal tunnel syndrome and flexor tenosynovial hypertrophy and recommended that claimant avoid repetitive gripping and lifting greater than 20 pounds. In his January 9, 1997 medical report, the doctor notes that claimant's job (the speed lathe job) required repetitive gripping with both hands and the use of vibratory tools, which the doctor identified as causing claimant's injuries.

4. In September 1997, the parties entered into a Stipulated Award in which claimant was awarded permanent partial general disability benefits for a 33.75 percent work disability followed by benefits for a 16 percent whole body functional impairment.

5. The Stipulated Award was filed with the Division of Workers Compensation on September 30, 1997. Attached to that document are letters from John P. Estivo, D.O., Lynn D. Ketchum, M.D., and J. Mark Melhorn, M.D. Dr. Ketchum's letter is dated January 9, 1997, and specifically states that claimant's work restrictions are no repetitive gripping and no lifting over 20 pounds. Based on the fact that the parties utilized Dr. Ketchum's January 1997 letter in the Stipulated Award, the Board concludes that respondent had knowledge of the medical restrictions set forth in that letter when respondent later reassigned claimant to the speed lathe job.

6. Despite claimant's bilateral upper extremity injuries and bilateral carpal tunnel release surgeries, respondent initially retained claimant in its employment. Claimant returned to her former shop but was assigned a clerical position. In that position, claimant generally performed desk and computer work.

7. On May 22, 1998, claimant experienced a flare-up in her upper extremity symptoms and sought treatment with the on-site company physician, Dr. John F. McMaster. Claimant requested to see another physician but the doctor declined to refer her.

8. Shortly after seeing the company doctor, claimant's supervisor advised her that she was being reassigned to her former speed lathe job. Claimant advised her supervisor that she could not do that work and that she wanted to see her doctor. Rather than addressing claimant's concerns or offering other accommodations, claimant's supervisor instructed her to report to the speed lathe job nevertheless. Because of her inability to do the speed lathe job, claimant did not report to that job but, instead, chose to apply for disability retirement, which was granted in large part due to claimant's coronary artery disease and depression. Claimant's last day of work for respondent was approximately May 28, 1998.

9. Claimant saw Dr. Ketchum for a second time in July 1999. Although claimant's condition had improved because she had not been working, the doctor did not modify his recommended work restrictions.

10. At the time of the December 1999 review and modification hearing, claimant was receiving $645 per month in disability retirement benefits and $1,061 per month in Social Security disability benefits. Respondent provided 100 percent of the contribution for claimant's retirement benefits, which commenced on an unspecified date in December 1998. The Appeals Board finds that both benefit payments are in the nature of disability benefits.

11. The Appeals Board finds and concludes that the speed lathe job, which caused claimant's bilateral carpal tunnel syndrome in the first instance, was not an appropriate job for claimant as it violated the medical restrictions that claimant should observe as the result of her upper extremity injuries. First, the speed lathe job required constant gripping, which

was a significant cause of claimant's injuries in the first instance, and was against Dr. Ketchum's recommended medical restrictions. Second, the speed lathe job required claimant to regularly work with vibratory tools as she would frequently use a "straight motor" and an "L head," which violated Dr. Estivo's and Dr. McMaster's medical restrictions against using vibratory tools more than three hours per day. Third, the speed lathe job also violated Dr. Ketchum's 20-pound lifting restriction as respondent's ergonomist Holly Landwehr, Ph.D., testified the job required some lifting of up to 50 pounds.

12. As a direct result of her work-related bilateral upper extremity injuries, claimant has lost the ability to do 8 of 11, or approximately 73 percent, of the work tasks that she performed in the 15-year period before developing those injuries. That finding is based upon Dr. Ketchum's opinion, which was formulated after reviewing the task list prepared by human resources consultant Jerry D. Hardin.

13. According to Mr. Hardin, claimant retains the ability to earn between $280 and $300 per week in the open labor market. That opinion is credible and uncontroverted.

CONCLUSIONS OF LAW

1. The Award should be modified to grant claimant benefits for a 71 percent permanent partial general disability commencing May 18, 1999.

2. Because bilateral upper extremity injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1996 Supp. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[1] and *Copeland*.[2] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that workers' post-injury wages should be based upon their ability rather than their actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[3]

3. Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.[4]

4. The Appeals Board has further interpreted K.S.A. 44-510e as requiring workers to make a good faith effort to retain their post-injury employment. The Board has held that workers who are performing accommodated work should advise their employer of any problems working within their medical restrictions and should afford the employer a reasonable opportunity to adjust the accommodations.

5. On the other hand, employers also must act in good faith.[5] In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine[6] or not within the worker's medical restrictions,[7] or where the worker is

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[1] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[3] *Copeland*, p. 320.

[4] *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* ___ Kan. ___ (1998).

[5] *Ford v. Landoll Corporation*, No. 82,031, ___ Kan. App. 2d ___ (February 11, 2000).

[6] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[7] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

fired after attempting to work within the medical restrictions and experiences increased symptoms.[8]

6. Under the facts presented in this claim, claimant was not required to attempt the speed lathe job. Claimant neither acted in bad faith nor attempted to manipulate her workers compensation claim by failing to attempt to perform the speed lathe job. Shortly before claimant was reassigned the speed lathe job, claimant requested additional medical treatment for a flare-up in symptoms. Claimant advised her supervisor that she could not perform the speed lathe job and that she wanted to see her doctor before attempting that job.

The Board concludes that claimant's fears and concerns that the speed lathe job was inappropriate were reasonable and well-founded. Claimant knew that job intimately as she had performed it for many years. Claimant and respondent also knew that in January 1997 Dr. Ketchum had recommended medical restrictions that would be violated in performing that job. Finally, claimant also realized that she was having increased symptoms doing the clerical job, which she believed to be less demanding of her hands than the speed lathe job. The Board concludes that the speed lathe job was inappropriate and, therefore, claimant was not required to attempt to perform it and risk further injury and aggravation.

Despite the above conclusion, a post-injury wage should be imputed as claimant has failed to prove that she made a good faith effort to find other employment when she decided that she could not perform the speed lathe job. Because the medical evidence presented does not establish that claimant cannot work, under the Workers Compensation Act claimant was required to seek appropriate employment that did not violate her permanent work restrictions and limitations. Therefore, for the period following May 28, 1998, which is the approximate date that claimant last worked, the Board will impute a post-injury wage of $300 per week.

7. In the September 30, 1997 Stipulated Award, the parties agreed that claimant's pre-injury average weekly wage was $846.90. But on February 4, 2000, the parties filed a stipulation in which they agreed claimant's pre-injury average weekly wage was $951.17. Comparing the imputed post-injury wage of $300 to the stipulated pre-injury wage of $951.17 yields a wage loss of 68 percent.

8. Averaging claimant's 68 percent wage loss with the 73 percent task loss creates a 71 percent permanent partial general disability.

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[8] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

9. Because claimant's benefit payments are disability rather than retirement benefits, neither qualifies as an offset against claimant's permanent partial general disability benefit.[9]

10. The Judge found that claimant filed the request for review and modification on November 18, 1999. The Workers Compensation Act provides that the effective date for modifying an award cannot be more than six months before the request for review and modification was filed.[10] Because claimant's request was filed on November 18, 1999, the earliest date that the award could be modified is May 18, 1999. But the Stipulated Award paid benefits through September 10, 1998.

AWARD

WHEREFORE, the Appeals Board modifies the March 15, 2000 Award to award claimant a 71 percent permanent partial general disability commencing May 18, 1999.

Pursuant to the Stipulated Award, for the period from May 1, 1996, through August 17, 1997, claimant was entitled to receive 67.71 weeks of permanent partial disability benefits at $110.01 per week, or $7,449.10, for a 33.75 percent permanent partial general disability.

Pursuant to the Stipulated Award, commencing August 18, 1997, claimant was entitled to receive an additional 55.57 weeks of permanent partial disability benefits at $326 per week, or $18,115.82, for a 16 percent permanent partial general disability. (The 55.57 weeks would have continued through September 10, 1998.)[11]

Commencing May 29, 1998, claimant's permanent partial general disability increased to 71 percent. Therefore, commencing May 29, 1998, claimant would have been entitled to receive 171.37 weeks of permanent partial general disability benefits, which is 294.65 weeks (415 x 71 percent) less the 123.28 weeks of permanent partial general disability benefits previously awarded. But the effective date of the review and modification is May 18, 1999.

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[9] K.S.A. 1996 Supp. 44-501(h). Also see *Green v. City of Wichita*, 26 Kan. App. 2d 53, 977 P.2d 283, *rev. denied* ___ Kan. ___ (1999).

[10] K.S.A. 44-528(d).

[11] The Stipulated Award does not compute claimant's entitlement to permanent partial general disability benefits using the formula that the Appeals Board normally employs. Under the Appeals Board's usual method of computing benefits, claimant would have been entitled to receive 68.29 weeks of permanent partial disability benefits at $326 per week for the period from April 26, 1996, through August 17, 1997, or $22,262.54, for the 33.75 percent permanent partial general disability. Commencing August 18, 1997, when the disability rating decreased to 16 percent, claimant would not have been entitled to receive any additional weeks of permanent partial disability benefits as the total award would have accrued and would have been paid out in full under the 33.75 percent work disability period. Nevertheless, in determining the amount due in this review and modification proceeding, the Board has attempted to preserve the parties' agreement as reflected in the Stipulated Award.

Due to the delayed filing of the review and modification request, for the 35.57 weeks between September 10, 1998 (the date upon which the benefits in the Stipulated Award ceased), and May 18, 1999 (the effective date of the review and modification), claimant receives no benefits. Therefore, commencing May 18, 1999, claimant is entitled to receive 135.80 weeks (171.37 - 35.57) of permanent partial general disability benefits at $326 per week, or $44,270.80, until the award is satisfied or until further order.

Marill Soupene is granted compensation from Raytheon Aircraft Company for an April 26, 1996 accident and resulting disability. Based upon an average weekly wage of $951.17, for the period from May 1, 1996, through August 17, 1997, Ms. Soupene is entitled to receive 67.71 weeks of permanent partial disability benefits, or $7,449.10, for a 33.75 percent permanent partial general disability.

For the period from August 18, 1997, through September 10, 1998, Ms. Soupene is entitled to receive 55.57 weeks of permanent partial disability benefits, or $18,115.82, for a 16 percent whole body functional impairment.

For the period commencing May 18, 1999, Ms. Soupene is entitled to receive 135.80 weeks of permanent partial disability benefits, or $44,270.80, for a 71 percent permanent partial general disability, for a total award of $69,835.72.

As of October 30, 2000, there is due and owing to the claimant 199.28 weeks of permanent partial general disability compensation for a total due and owing of $50,340.92, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $19,494.80 shall be paid at $326 per week until paid or further order of the Director.

The Appeals Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The majority opinion provides no reduction from the award for claimant's retirement benefits being provided by respondent. The majority opinion describes those benefits in the amount of $645 per month as "disability retirement benefits." However, in claimant's brief to the Board, discussion of those benefits is contained in the last paragraph of claimant's brief prior to the conclusion, which states:

> On the issue of retirement and disability benefits, claimant is receiving both types. She retired from Raytheon in December of 1998, and began receiving retirement benefits in the amount of $645 per month. See Review and Modification Hearing, p. 18. She is also receiving Social Security *Disability* Benefits. While retirement benefits may be an offset under current law, Social Security Disability Benefits should not produce any offset.

In respondent's brief to the Board, the only mention of this retirement benefit is contained in the last paragraph of respondent's brief prior to the conclusion, which states:

> Finally, the issue of the claimant's retirement benefit and Raytheon's credit under K.S.A. 44-501(h) is relevant if the administrative law judge's decision is reversed. Claimant concedes the credit is applicable for the $645 per month she receives.

The last sentence in the conclusion paragraph of claimant's brief to the Board states:

> The offset may be appropriate for Raytheon monthly retirement benefits of $645.00 but payment of Social Security Disability Benefits should not impact the Award.

K.A.R. 51-3-8 obligates the parties at the first full hearing to agree on "what issues can be stipulated to and what issues are to be in dispute in the case."

Both claimant's and respondent's briefs describe the $645 per month as a retirement benefit subject to the offset rather than as a disability benefit.

K.S.A. 44-555c(a) obligates the Board to review questions of law and fact as presented to the administrative law judge. This issue was not before the Administrative Law Judge but was instead agreed to by the parties. This Board Member would find that the $645 per month from Raytheon is a retirement benefit and subject to the K.S.A. 44-501(h) offset.

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BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Jeff C. Spahn, Jr., Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director